IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76- **76-903**

DAVID FEIST and DOLORES FEIST, his wife, MYRTLE SINGLEY and MARGARETA HAGSTRAND,

Appellants

v.

LUZERNE COUNTY BOARD OF ASSESSMENT APPEALS

Appellee

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

Counsel for Appellants:
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December 29, 1976

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APPENDICES

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I. Petitioners, David Feist and Dolores Feist, Myrtle Singley and Margareta Hagstrand, seek review of the final order of the Supreme Court of Pennsylvania entered September 30, 1976, denying petitioners' Petition for Allowance of Appeal, and in support of their prayer for review submit this Petition for Certiorari.

II. The Reported Opinions of the Courts Below Are:

A. David Feist and Dolores Feist, his wife, et al., v. Luzerne County Board of Assessment Appeals, _____ Pa. _____ (1976); _____ A.2d _____(1976).

B. Feist, et al. v. Luzerne Co. Bd. Assess. App., 22 Commonwealth Ct. 181 (1975); 347 A.2d 772 (1975).

III. Grounds of Jurisdiction

A. This suit arose as a statutory appeal from property tax assessments imposed on the properties of the petitioners by the respondent, the Luzerne County Board of Assessment Appeals, for the year 1972. The petitioners challenged their assessments on the grounds that the singling out of their communiteis and of residential property for reassessment and the use of arbitrary and capricious methods for determining property values throughout Luzerne County constituted violations, inter alia, of the equal protection requirement of the 14th Amendment of the United States Constitution.

B. The order appealed from was dated and entered on September 30, 1976.

C. Jurisdiction to review that order lies in this Court pursuant to 28 U.S.C. §1257(3).

IV. Questions Presented for Review

A. Did the special consideration for reassessment of 2 out of 74 municipalities within the taxing district of Luzerne County, while a very limited number of properties in the remaining 72 municipalities were so considered, constitute a denial of equal protection to property owners, including petitioners, in the two selected municipalities?

B. Did the singling out of residential properties in the two selected communities for consideration for reassessment, while other types of property were not so considered and therefore not reassessed, deny equal protection of the laws to owners of residential properties, including petitioners?

C. Where a percentage rate of 35% was consistently applied to the Assessor's determination of fair market values to arrive at assessed values, were petitioners denied equal protection of the laws by application of the 35% rate to their properties' valuations when the procedures for determining market values deliberately adopted by the Assessor resulted in the systematic undervaluation of other properties throughout the County and petitioners were restricted by the trial court to proof of the value of their own or "similar" properties?

D. Assuming that petitioners' equal protection rights were violated by a singling out of their communities and/or of residential properties for reassessment or by invalid procedures employed to determine market values County-wide, should the entire 1972 assessment be set aside as Constitutionally void (with property taxes for 1972 imposed at the 1971 assessments) and should petitioners be awarded attorneys' fees?

V. The Constitutional Provisions and Statutes Involved in the Case Are:

A. United States Constitution, Amendment XIV, Section 1 (Equal Protection):

"AMENDMENT XIV.

* * * *

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B. Pennsylvania Third Class County Assessment Code, Act of June 26, 1931, P.L. §1379, §1; 72 P.S. §5342; Vol. 72, 1976 Supplement, pp. 81-82:

"§5342. Appointment by county commissioners; salaries; termination of certain offices

"In all [footnote omitted] counties of the second A and third class in this Commonwealth, there is hereby created a board, to be known as the Board of Assessment Appeals, which shall be composed of three members. The members of said board shall be appointed by the county commissioners of such counties to serve for terms of four years each...."

C. Pennsylvania Third Class County Assessment Code, Act of June 26, 1931, P.L. 1379, §3(a); 72 P.S. §5344(a); Vol. 72, 1976 Supplement, p. 82:

"§5344. Assessments, listing, valuations and exemptions for tax purposes; land subject to restrictive covenant

"(a) It shall be the duty of said board, in each county to which this act applies, to make and have supervision of the making of annual assessments of persons, property and occupations now or hereafter made subject to assessment for taxation for county, borough, town, township, school, poor and institution district purposes, and to make and have supervision of listing and valuation of property excluded or exempted from taxation. In making assessments

of property at less than actual value, it shall accomplish equalization with other properties within the taxing district. The making of triennial assessments as provided by existing law is hereby abolished."

D. Pennsylvania Third Class County Assessment Code, Act of June 26, 1931, P.L. 1379, §7; 72 P.S. §5348; Vol. 72, p. 626:

§5348. Revision of assessments and valuations by board; assessment roll; exemption list

"The said board shall, on or before the first day of August, examine and revise the said annual assessments and valuations, increasing or decreasing the same as in their judgment may seem proper, and shall add thereto and assess such property or persons taxable upon occupations as may have been omitted, and may also add thereto the names of any persons subject to a school per capita tax or poll tax as may have been omitted; and such added assessments may be used for the taxation of the property and persons only for the current year and the preceding three years if there was liability for such taxes under existing law...."

VI. Statement of the Case

A. Procedural Background

This action originated as an appeal from the assessment of real estate taxes in Luzerne County for the year 1972. The case was instituted by notices of appeal of the 1972 real estate tax assessment by petitioners, who are property owners in the municipalities Sugarloaf and Conyngham, Luzerne County, Pennsylvania. A hearing was held before the respondent, the Luzerne County Board of Assessment Appeals. As a result of the hearing, the assessment on the property of petitioner Feist was reduced by $2,010; the assessments on the properties of petitioners Singley and Hagstrand were unchanged. The Assessor's decision was not accompanied by any findings of fact or other opinion.

A notice of appeal was filed in the Luzerne County Court of Common Pleas. The pleadings in the appeal to the Court of Common Pleas consisted of the petition and answer by the Assessor. Trial was held before the Honorable Richard L. Bigelow beginning on May 30, 1972 and concluding on November 9, 1972, with various interruptions in between. Judge Bigelow entered his decision on September 9, 1974, reducing the assessments on the properties of the petitioners but denying all other relief requested. The decision was appealed to the Pennsylvania Commonwealth Court, which affirmed the decision of the Court of Common Pleas by its decision of December 4, 1975. Petitioners duly filed a petition for allocatur with the Supreme Court of Pennsylvania, which petition was denied by order of that court on September 30, 1976, without opinion.

B. Pertinent Facts

The petitioners own single-family residential properties in two small communities of Luzerne County, Conyngham Borough and Sugarloaf Township (R34a-36a). Luzerne County is comprised of 74 municipalities (R2358a). Within these 74 municipalities, there were 117,977 parcels of real estate assessed for tax purposes for the year 1972 (R37a). For 1972, the assessments of 4,681 properties in the County (4% of the total number of properties) were changed from the prior year's assessment. The remaining 96% of the properties were assessed for 1972 at the same figure as in 1971 (R37a). In Conyngham Borough there were 593 properties on the assessment records for 1972; of these, 484 (or 81.5%) of the properties were reassessed for 1972 (R37a). In Sugarloaf Township, there were 978 properties on the assessment records for 1972; of these, 504 (or 51.5%) were reassessed for 1972 (R37a-38a). Excluding Sugarloaf Township and Conyngham Borough, the remaining 72 municipalities in Luzerne County had only 3.17% of their properties reassessed for 1972 (R38a). With the exception of the addition of new construction to the assessment roles, all reassessments for 1972 in Sugarloaf and Conyngham were on residential properties, chiefly single-family dwellings (R38a).

The vastly disproportionate number of assessment changes in Sugarloaf and Conyngham, as contrasted with those occurring in other municipalities in Luzerne County for 1972, were the result of direct instructions to Herbert Craze and George Walko, Field Investigators in the County Assessor's Office, by Thomas Garrity, Chief

Clerk and Director of the County Assessor's Office, which in turn resulted from Mr. Garrity's conclusions, based upon continuing studies made by him, that in these two municipalities the assessments were "running behind" fair market value of the properties and exceeded 14 percentage points permissible deviation (R38a).

The "continuing studies" made by Mr. Garrity and his staff, routinely and for all areas of the County, involved comparisons of current assessments of properties with selling prices for said properties set forth in deeds or reflected by revenue stamps when deeds of sales of these properties were recorded and copies received in the Assessor's Office (R38a).

When these studies indicated a pattern of variation of more than 14 percentage points between assessed valuation and what assessed valuation would be if based upon a 35% ratio and sales prices of properties in an area, Mr. Garrity personally would view the properties in the area, and on his instructions members of the Assessing staff would make block checks (by exterior views) in the area, check photographs, check for changes in the data appearing on the master file cards and thereafter a consensus of market value would be arrived at by Mr. Garrity and other staff members to which value would be applied the 35% ratio to arrive at the new assessment (R38a).

Sugarloaf and Conyngham were the only communities in which such intensive examinations for reassessment were conducted on a community-wide basis for 1972; intensive examinations for reassessment were

conducted in portions of four of the other 72 communities in the County (R39a).

The last tax year for which there was a physical view (both interior and exterior examination) of each property for tax assessment purposes was 1965. The work for the 1965 assessment was done during the period 1958 through 1965 (R126a-127a). Information on the interiors of improved properties (other than new properties for which an interior inspection was made) used by the Assessor in determining the market value of the properties was obtained by the Assessor from master property cards for each property in the County maintained in his office, data on which was obtained from 1958 through 1965, except for new building subsequent to 1965 (R290a). Sugarloaf and Conyngham were the only communities in Luzerne County in which every property was considered for re-valuation in 1972 (R56a).

C. Federal Questions Raised and Passed On

Petitioners first raised the singling out of their communities and of residential properties for reassessment and application of an unequalized assessment ratio to their properties in their hearing before the respondent on appeal from their assessments as part of their contentions that the assessment procedures utilized by the Assessor in Luzerne County were so defective as to constitute a violation of their equal protection rights and to require a new County-wide reassessment. While reducing the appraised value of the property of one of the petitioners, the Assessor ignored the challenge, both constitutional

and statutory, to the procedures used in its 1972 assessment. The Assessor's decision was not accompanied by any findings of fact or other opinion.

1. The singling out of two communities for consideration and intensive examination for reassessment constituted a denial of petitioners' equal protection rights

In the Court of Common Pleas action, petitioners first raised this issue in ¶¶12, 15, 16 and 17 of their complaint, arguing that the singling out for revaluation and door-to-door examination of properties in selected areas such as those in which petitioners lived, which are then appraised at 1972 values, while in the remainder of the County the Assessor relied on appraised values compiled in 1965 (except where individual properties were sold, in which case the deed price was used for the new appraised value for that property) constituted a denial of equal protection.

The trial court denied petitioners' equal protection claim on this point. The court's discussion of the issue is found in the record (54a through 69a), portions of which are as follows:

> "Findings of Fact Nos. 20, 21 and 22 are pertinent to this issue. As plainly demonstrated in those findings, during 1971 a special effort was made by the county assessors in these two municipalities as the result of which the 504 (51.5%) of the properties in Sugarloaf Township

and 484 (81.5%) of the properties in Conyngham Borough were reassessed, i.e. the assessments were changed. For the remaining municipalities of the County only 3.17% of the properties were reassessed. In other words as there were 117,977 assessed properties in Luzerne County for 1972, of which 4,681 (3.1%) had assessment changes made for that year, 21.1% of all assessment changes made in Luzerne County for 1972 were in these two municipalities which, combined, have only 1.3% of the assessed properties in the county. See Petitioner's Exhibit No. 2 and Petition, Paragraph No. 17, admitted by stipulation. (N.T. p. 20) It is Mr. Garrity's explanation of this phenomenon (N.T. pp. 66-71) that he conducted a continuing study of the current selling prices of real estate by deed tax stamps as related to assessments in the County, that for three years the assessments in Sugarloaf Township and Conyngham Borough had lagged behind the rest of the County (N.T. pp. 23-24) that he therefore sent a team (Mr. Walko and Mr. Craze) into these two municipalities to make block checks, examine photographs and check assessment cards, (N.T. pp. 30-31) and that the purpose of this examination was to obtain uniformity as to these two municipalities with the rest of the County. He also testified,

as Petitioners' witness, that similar although less intensive efforts were made in other municipalities, i.e., Wilkes-Barre Township, Plains Township, Laflin Borough and to some extent in Hanover Township).

"As to the special treatment accorded Sugarloaf Township and Conyngham Borough for 1972, this consisted of the consideration of <u>every</u> property in these municipalities for re-valuation while in other municipalities only segments were so considered, the decision to so consider every property being based upon the need for this action as shown by Mr. Garrity's studies which indicated to him that in these two municipalities there were properties 'on the tax roll for less than market value' compared with other municipalities in their school district and compared with other school districts (N.T. 37-38, 66-67). Mr. Garrity maintained and testified that no community was singled out for intensive reassessment and that this reassessment 'was carried out in every segment of every area that was found to need it' (N.T. p.38), and that a concentrated effort was not made in an entire municipality, other than Sugarloaf Township and Conyngham Borough, because in the other municipalities his studies indicated problems in only segments of these other municipalities and that in those

segments a similar concentrated reassessment effort was conducted for 1972. (N.T. pp. 37-40).

* * *

"... However, the evidence does not support any conclusion that Mr. Garrity and the sub-assessors deliberately elected to raise estimates of market value above the levels of said values throughout the county in these two municipalities or to apply different ratios to the value estimates than those applied in other municipalities in the County.

* * *

"It is quite apparent that, from a strictly mathematical or statistical point of view, appellants' claims that Mr. Garrity's 'studies' lacked mathematical sophistication has some merit, but what appellants overlook is the simple fact that Garrity's 'studies' did not produce changes in valuation but only the signal that a closer examination of the properties in a particular area should be made.

* * *

"In fact, it appears to the Court that Mr. Garrity would be subject to censure by the owners of the other 113,296 properties in Luzerne County if he had not reexamined the Conyngham Borough and Sugarloaf Township assess-

ments in view of his studies and the results thereof. As to equal protection of the laws, no authority has been called to the Court's attention that this is served by maintaining inequality of treatment in determination of fair market value, and there is no evidence that Mr. Garrity was incorrect in the determination by his staff and himself of the market values of the three subject properties, or for that matter, of the 985 other properties in these two municipalities which were reassessed, i.e., the assessment changed, in the 1972 assessment procedure. There is absolutely no proof that a single family dwelling in either of these municipalities is assessed differently, that a market value thereof is determined by a different manner than or a different ratio than 35 percent is applied thereto than is done, for example, in any other borough or second class township, or first class township or city in Luzerne County.

* * *

"The Court, mindful of the testimony and conclusions of Professor Wasileski, nonetheless concludes that Mr. Garrity's decision to reexamine the market value determinations for the properties in Sugarloaf Township and Conyngham Borough was predicated upon two phenomena: his studies which indicated a problem

in these municipalities (and parts of others) and, the results of the block study by his subordinates and his inspection of the properties in those areas. Whether he might have pursued a more sophisticated statistical process in his studies does not affect or negate the decision to reexamine these areas. It is the duty of the assessor to attempt to attain uniformity of treatment among taxpayers in the several areas of the county, not to perpetuate inequality where he discovers it. Furthermore, the 'singling out' complained of by appellants appears to vanish when the bases for this action is considered - in fact, the contrary appears to be fact, namely, due to changes in market value in these particular areas, many properties were underassessed, particularly residential properties, and the efforts of the assessor's office and Mr. Garrity were to achieve fairness and equality rather than perpetuate inequality. Constitutionally and legally, the former are the required elements of a valid assessment program. In the judgment of the hearing judge, whatever 'singling out' of properties in Sugarloaf Township and Conyngham Borough resulted from the reassessment in these areas was justified by inequities existing in the previous assessments measured by changes in fair market value. Thus, there is no merit to this reason for relief

to petitioners other than that granted as to revising their individual property assessments." (R54a-69a)

Appeal to the Commonwealth Court of this challenge to the 1972 assessment was on the record of the trial court proceeding, including the complaint, and the question was before that court without having to be otherwise raised. The Commonwealth Court affirmed the decision of the trial court, reproducing portions of the trial court's opinion. The Commonwealth's Court opinion contained no discussion of its own of this issue.

Petitioners maintained their challenge to the singling out of the two communities within the County for reassessment in their petition for allowance of appeal to the Supreme Court of Pennsylvania (Petition for Allowance of Appeal, pp. 14 through 19). By the order appealed from here, entered September 30, 1976, the Supreme Court of Pennsylvania denied petitioners' petition without comment, thereby sustaining the decision of the Commonwealth Court.

2. The singling out of residential properties for consideration for revaluation violated petitioners' equal protection rights

Petitioners first raised this challenge to the reassessment in the trial court in ¶12, 23 and 25 of their complaint, wherein they allege that the reassessment of their property was done as part of a systematic, intentional undervaluation of properties other than single-family

residences resulting in a lack of uniformity and a discrimination against single-family residential properties and in favor of other types of real estate in the taxing district. The trial court denied this equal protection claim, discussing the issue in its opinion at pp. 69a through 71a of the record, as follows:

* * *

"In earlier discussion, it was concluded that Garrity's studies indicated problem areas in which assessed valuations were not keeping pace with changes in market value and it was noted that if the variance exceeded fourteen percent Mr. Garrity would personally examine the properties which produced the indications and then subject the area involved to block checks and finally to re-calculation of market value.

"Appellants maintain that the fact that residential properties bore the brunt of this reassessment is reason to declare the entire 1972 county assessment illegal, upon constitutional grounds of denial of equal protection of the laws to residential property owners in Sugarloaf Township and Conyngham Borough. As a matter of general law, what is constitutionally prohibited is 'the intentional, systematic omission or undervaluation' of other classes of property, in other words a deliberate and purposeful discri-

mination in the application of the tax. 16A C.J.S. CONSTITUTIONAL LAW Sec. 522; STILMAN V. TAX REVIEW BOARD, 402 PA. 492.

* * *

"The hearing judge is of the opinion that the reassessment of residential properties, and particularly the three subject properties, in Conyngham Borough and Sugarloaf Township was to correct inequality as indicated by Garrity's studies and thus to achieve practical equal protection of the laws rather than to violate anyone's right to equal protection in the 1972 assessment. Therefore, the hearing jduge concludes that there is no merit to this reason submitted by appellants as the basis for their proposed invalidation of the entire 1972 Luzerne County Assessment." (R70a-71a)

The petitioners' claim that their equal protection rights were denied by an intensive reassessment effort directed at single-family residential properties was carried forward to the Commonwealth Court by appeal, without having to be raised anew there. It was argued in petitioners' brief in the Commonwealth Court, pp. 34 through 41. The Commonwealth Court sustained the decision of the Court of Common Pleas and neither discussed the issue itself nor reproduced any of the trial court's discussion thereof. The equal protection challenge to intensive reassessment of residential properties was

preserved by petitioners in their petition for allowance of appeal to the Supreme Court of Pennsylvania (pp. 19-22). By the order of the Supreme Court of Pennsylvania appealed from here, the petitioners' petition was denied and the decision of the Commonwealth Court was thereby sustained.

3. Petitioners were denied equal protection by assessment at the rate of 35% of the actual market value of their properties where arbitrary procedures employed by the assessors in determining market values resulted in the systematic undervaluation of other properties throughout the County

The issue was first raised in the Court of Common Pleas action in ¶¶12, 21, 22, 26 and 27 of the complaint. The contention of petitioners was that numerous other properties located throughout Luzerne County were assessed at a lower rate of their respective fair market values than were the properties of petitioners; that such lower assessed values were the result of an intentional, systematic undervaluation by the respondent of those taxable properties resulting from the arbitrary and capricious procedures employed by the respondent to determine market values (and thus assessed values) of properties throughout the County; and that the resulting nonuniform assessment ratio constituted a denial of petitioners' right to equal protection.

The relevant portions of the trial court's opinion were as follows:

* * *

"If the issue being tried is lack of uniformity, as here, the appealing taxpayer may sustain his burden of proof by a showing that a lower ratio of assessment to actual value has been applied to similar properties: i.e., if the lack of uniformity in a golf course assessment is the issue, appellant may prove the assessments of other golf courses in the county and may, if relevant, prove that the actual value of other golf courses is different from that determined by the assessors. VALLEY FORGE GOLF CLUB, INC. TAX APPEAL, 3 PA. COMMONWEALTH CT. 644, 650. Where, however, the assessors have applied a fixed ratio of assessed to actual value throughout the district, the owner is entitled to have this ratio applied to the actual value of his property. VALLEY FORGE GOLF CLUB, INC. TAX APPEAL, supra, p. 649.

"For the purpose of deciding proper assessments on appeal, the constitutional uniformity requirement mandates that the assessment of a particular appellant shall reflect an assessment at not more than the "common level" of assessments prevailing in the district as a whole, RICK APPEAL, 402 PA. 209, the appellate court observing that a taxpayer is not entitled to be assessed at the lowest ratio he can point to if in fact that lowest ratio does not reflect the common assessment level in the

district. By the term 'common level' is meant the fixed ratio of assessed to market value 'where the evidence shows that the assessors have applied a fixed ratio...' and '..where the evidence indicates that no such fixed ratio has been applied, and that ratios vary widely in the district, the average of such ratios may be considered the "common level"'. DEITCH COMPANY V. BOARD OF PROPERTY ASSESSMENT, 417 PA. 213, 220. In Finding of Fact No. 19, the hearing judge has concluded that the Board applies a 35% ratio to fair market value as determined by the Board to calculate assessed value. This has been the testimony of the witness Garrity, the Director of the Assessors Office, and assessor's records show that this ratio was applied to the fair market values of the three (3) subject properties to arrive at the assessed valuations from which appeals to the Board of Assessment Appeals were taken ....

* * *

"It is the conclusion of the hearing judge that Mr. Garrity's testimony that his office applies a 35% ratio to fair market value as determined by his office to arrive at assessed value is correct and true and that this ratio is the ratio commonly applied in the county to fair market value as determined by the assessor for

that purpose. The testimony to the contrary deals with a very small number of properties (6 out of 117,977, 91 out of 117,977, 42 out of 117,977, at most a total of 139 properties) and within these groups two (2) major weaknesses appear: first, the properties which were studied in detail (the six (6) listed above) are not similar to the three (3) appealing properties, each of the six (6) having large acreage and most having no buildings erected thereon, and the valuation in five (5) being limited to land value, the major item of valuation in each of the appealing properties being a dwelling; second at least in the cases of the Bell properties, very little data other than summary data having been presented in support of Mr. Bell's conclusions....

"The Commonwealth Court has indicated that the burden on appellants is not 'the impossible burden of proving that some lower ratio was applied generally throughout the county' but may be sustained '.....by showing that other similar properteis, that is, other golf courses, were assessed at a lower ratio than was applied in its case'. VALLEY FORGE GOLF CLUB, INC. TAX APPEAL, supra, pp. 650-651. The hearing judge seems to be in somewhat the same position as that characterized by the Commonwealth Court as 'impossible' in that, from the

evidence presented, the hearing judge must somehow determine the ratio 'used generally in the taxing district' (72 P.S. 5350(a), or the 'common level' thereof, (DEITCH COMPANY case, supra). As noted above, the hearing judge has concluded that the assessor's office applies the 35% ratio routinely and generally throughout the county. Thus, what the taxpayer is entitled to is to have this ratio applied to the actual value of his property. DEITCH COMPANY V. BOARD OF PROPERTY ASSESSMENT, supra." (R41a-42a, 44a-45a)

The petitioners' constitutional objection to application of the 35% assessment rate to their properties was carried forward to the Commonwealth Court on the record of the trial court proceeding and the question was before that court without having to be otherwise raised. The Commonwealth Court sustained the decision of the Court of Common Pleas without any commentary of its own. This equal protection challenge was again raised in petitioners' petition for allowance of appeal to the Supreme Court of Pennsylvania. By its denial of the petition in the order appealed from here, the Supreme Court of Pennsylvania sustained the holdings of the Commonwealth Court.

4. The entire 1972 County assessment should be set aside and petitioners should be awarded attorneys' fees

In their prayer for relief in their complaint in the Court of Common

Pleas action, the petitioners sought the invalidation and setting aside of the 1972 Luzerne County assessment and further sought an award of attorneys' fees. With the exception of reducing the assessments of petitioners' individual properties, the trial court denied all relief sought by the petitioners (R87a-88a). The relief sought by the petitioners remained the same on appeal to the Commonwealth Court and in the petition for allowance of appeal to the Pennsylvania Supreme Court. The Commonwealth Court did not discuss the merits of the prayed for relief in sustaining the trial court's decision, nor did the Pennsylvania Supreme Court do so in its order denying petitioners' petition for allowance of appeal.

VII. Reasons Relied on For Allowance of the Writ

A. The special examination for reassessment of Sugarloaf and Conyngham constitued a denial of equal protection to petitioners, proeprty owners in those two communities, in that other municipalities within the County were not subjected to a similar examination and the bulk of the properties therein were not considered for a change in assessment in 1972. As a result, petitioners were assessed at 1972 valuations while other property owners were systematically assessed at lower 1965 valuations. This intentional restriction of revaluation to properties in Sugarloaf and Conyngham violated the principles enunciated by this Court in Sioux City Bridge Co. v. Dakota County, Neb., 260 U.S. 441, 43 S.Ct. 190 (1923).

The 1972 Luzerne County assessment was carried out by employees of the respondent pursuant to the Pennsylvania Third Class County Assessment Code, 72 P.S. §§5342 and 5344. Pennsylvania law does not provide for sequential assessment of a third-class county such as Luzerne (Pennsylvania Third Class County Assessment Code, 72 P.S. §§5344 and 5348) and the 1972 assessment was undertaken as a county-wide assessment.

For 1972, a special assessment effort was made in Sugarloaf and Conyngham, 2 out of 74 municipalities in the County, which was in addition to the regular reassessment activities of the Assessor's Office in those communities (R54a-55a).

Petitioners contend that the singling out of Sugarloaf and Conyngham for consideration for revaluation in 1972 amounted to a partial assessment violative of their right to equal protection of the laws. In its opinion the trial court stated as follows (R56a):

> "As noted above, a sub-assessor views the exterior of each property in his district annually and notes changes or additions on the master card (N.T. 66) on which the basic detailed information was entered in 1965 (N.T. pp. 5, 1180) except for additions to existing buildings or new buildings for which the detailed data is entered by the sub-assessor when he, on his rounds, discovers the change or addition (N.T. p. 13). <u>These properties in which changes had been noted on the master cards are the ones for</u>

> <u>which an assessment change would be made</u>--first by determination of market value by Mr. Garrity (N.T. 1776) and then by application of the 35 percent ratio to this value (N.T. 1717)."
> (Emphasis added.)

The trial court's statement that a subassessor views the exterior of each property in his district annually (which the trial court made its 27th finding of fact) is flatly contradicted by the court's further statement in its decision (R56a-57a) that only segments of areas within Luzerne County other than Sugarloaf and Conyngham had each property examined for reassessment in 1972 while in Sugarloaf and Conyngham "<u>every</u>" property was considered for revaluation.

The lack of examination of every property in the County for the 1972 assessment was consistent with the standard practice of the Assessor's Office. For example, Herbert Craze, a Field Investigator for the Assessor's Office who conducted the special 1972 intensive assessment effort in Sugarloaf and Conyngham, testified that for the five previjous years he had been assigned to the Wyoming Valley West School District (R 229a). During that five-year period, Mr. Craze never conducted door-to-door investigations of each and every property in a single tax year (R230a). Joseph R. Valkusky was the Field Investigator regularly assigned to assess Sugarloaf and Conyngham from approximately August 1969 to July 31, 1971, which included the time within which the 1972 assessment was prepared (R350a, 2357a) but predated the special effort. When assigned

to his job as Field Assessor in Sugarloaf and Conyngham, Mr. Valkusky was told to "pick up a new home or addition" and did nothing else (R356a-357a).

It would seem apparent that the failure to examine some properties while subjecting others, such as those in Sugarloaf and Conyngham, to close scrutiny would result in manifest inequalities even if the same criteria were employed to determine market value inasmuch as accurate, current data would be available on the properties examined and would not on those which escaped examination. What occurred in Luzerne County's 1972 assessment, however, was more directly discriminatory. As the trial court indicated (R56a, supra), the practice followed generally throughout the County by the Assessor was that only those properties for which changes or additions had been noted on the master cards would be subject to a change in assessment; for the remainder, not only the data, but the valuation and assessment of 1965 would be carried forward. The testimony of Mr. Garrity is unequivocal that the only two communities where every property was considered for an assessment change for 1972 tax purposes were Sugarloaf and Conyngham (R158a):

> "Q. Well, then based on your statement in the deposition, you say that in Sugarloaf and Conyngham they were the only municipalities where every property was considered for an evaluation change for tax purposes for '72?
>
> "A. That is correct."

The record was unrebutted that property values were generally appreciating in Luzerne County (R972a, 977a). The effect of being "considered for an evaluation change" in these circumstances is apparent: Consider two identical residential properties, neither of which has undergone any changes or additions since 1965. One property is located in Sugarloaf or Conyngham and is therefore being considered for revaluation; the other is located elsewhere in the County. Since the latter has undergone no changes or additions, no assessment change would be made for it, and its owner would pay the same property taxes he paid in 1965. The other property, however, since it is located in Sugarloaf or Conyngham, has its market value revised according to 1972 values. It is this higher 1972 appraised market value that is multiplied by 35% to arrive at the assessed value of the Sugarloaf or Conyngham property. In the inflationary situation prevailing in 1972, being singled out for reassessment was tantamount to having one's assessment raised; conversely, not being singled out guaranteed another year at the old assessed value.

Where properties outside Sugarloaf and Conyngham were assessed at 1965 values and properties within those two municipalities were assessed at 1972 values, the trial court's conclusion (R67a) that there was no proof that a single-family dwelling in Sugarloaf or Conyngham was assessed differently or that its market value was determined by a different manner than anywhere else in the County simply does not hold water and is belied by the results: Changes of assessments in 81.5% of the properties in Conyngham Borough, 51.5% in

Sugarloaf, and 3.17% in the remainder of Luzerne County (R37a-38a).

The trial court acknowledged a "special effort" by the Assessor in Sugarloaf and Conyngham, which was in addition to and subsequent to the routine efforts in those two municipalities (R54a, 55a). Sugarloaf and Conyngham became subject to additional consideration for change in assessed market values as the result of "studies" of the Chief Assessor, Mr. Garrity, which indicated to Garrity that those two municipalities, and particularly residential property therein, were undervalued on the Assessor's records.[1/]

The unrebutted testimony of petitioners' expert witness was to the effect that these "studies" were mathematically meaningless and utterly worthless (R64a). The trial court acknowledged the possible fallaciousness of Mr. Garrity's studies but considered it immaterial inasmuch as the studies were not used to calculate market value but only led Mr. Garrity to believe that properties in Sugarloaf and Conyngham were lagging behind in their assessments

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[1/] These studies consisted of a comparison between the assessed market value and the stated consideration in or tax stamps on deeds of properties conveyed in Sugarloaf and Conyngham and the application of a mathematical formula intended to show whether the discrepancy between the two values was within an acceptable and permissible range.

(R67a). The court found no fault with Garrity's consequent decision to consider the entirety of Sugarloaf and Conyngham for revaluation while not so considering the bulk of properties elsewhere in the County on the grounds that Garrity's purpose was to equalize assessments by bringing assessed property values in Sugarloaf and Conyngham up to date (R67a, 68a).

The Assessor's motive, however, was never at issue. What was, and is, at issue is his failure to consider properties elsewhere in the County (unless they showed changes or additions) for revaluation from their 1965 levels, while so considering properties in Sugarloaf and Conyngham. The Assessor's activity thus constituted a discriminatory partial assessment and an intentional, systematic omission and undervaluation of properties outside Sugarloaf and Conyngham. Even if petitioners were not overassessed (the market values of their properties and thus their assessments were reduced by the court) the systematic undervaluation of other properties violated their right to equal protection. Sioux City Bridge Co. v. Dakota County, Neb., supra; Cromwell v. Hillsborough Tp., Somerset County, New Jersey, et al., 149 F.2d 617 (3rd Cir., 1945), affd. 326 U.S. 620 (1946). Because it denied petitioners the equal protection of the laws, the entire 1972 assessment for Luzerne County should be set aside.

B. The singling out of residential properties in Sugarloaf and Conyngham for intensive consideration for reassessment while other types of property were not so considered, denied petitioners the equal

protection of the laws in that residential properties were assessed at 1972 valuations while other types of property were systematically assessed at lower 1965 valuations. This systematic undervaluation of non-residential property violated the constitutional requirements announced in Sioux City Bridge Co., supra.

Herbert Craze, who was assigned to the special reassessment effort in Sugarloaf and Conyngham, testified that his special assignment was to reassess only residential properties (R259a-260a):

> "Q. What did you--or did you do any properties in Sugarloaf and Conyngham which were land without structures on them?
>
> "A. No.
>
> "Q. Your work then was restricted solely to properties in Sugarloaf and Conyngham that had structures on them?
>
> "A. That was our purpose of this particular survey, yes. We checked the land to see whether it was wooded, or level. We made some notes on it but we didn't do anything about putting prices on.
>
> "Q. Were your instructions then to reassess properties in Sugarloaf and Conyngham that had structures on them?
>
> "A. That is correct.

> "Q. Mr. Craze, is it your testimony that the only properties you reappraised for '72 purposes in Sugarloaf and Conyngham were single-family residences?
>
> "A. That's correct. Well, there may have been a duplex or double block included in that, but I was concerned primarily with residential units. One--no more than two families."

Thus, just as Sugarloaf and Conyngham were singled out of all the municipalities in Luzerne County for consideration for a change in value, so within Sugarloaf and Conyngham residential properties, and particularly single-family dwellings, were singled out for such consideration. As the court found (Finding of Fact No. 21, R38a):

> "With the exception of new construction all assessment changes in these two municipalities were residential properties, mainly single family dwellings."

The failure to consider commercial properties or undeveloped land for revaluation in 1972 meant that the 1965 assessment for such properties was again carried forward; the thorough and blanket consideration of all residential properties within Sugarloaf and Conyngham, conversely, meant that such properties were valued at appreciated 1972 valuations and their assessments accordingly increased.

On this question, the trial court stated (R70a-71a):

"Appellants maintain that the fact that residential properties bore the brunt of this reassessment is reason to declare the entire 1972 County assessment illegal, upon constituional grounds of denial of equal protection of the laws to residential property owners in Sugarloaf Township and Conyngham Borough. As a matter of general law, what is constitutionally prohibited is 'the intentional, systematic omission or undervaluation' of other classes of property, in other words, a deliberate and purposeful discrimination in the application of the tax. 16A C.J.S. Constitutional Law Sec. 522; Stilman v. Tax Review Board, 402 Pa. 492.

* * *

"The hearing judge is of the opinion that the reassessment of residential properties, and particularly the three subject properties, in Conyngham Borough and Sugarloaf Township was to correct inequality as indicated by Garrity's studies and thus to achieve practical equal protection of the laws rather than to violate anyone's right to equal protection in the 1972 assessment. Therefore, the hearing judge concludes that there is no merit to this reason submitted by appellants as the basis for their proposed invalidation of the entire 1972 Luzerne County assessment."

Again, the trial court confuses, in so holding, the word "intentional" with the term "bad faith." The deliberate limitation of consideration for revaluation to residential properties in a generally appreciating real estate market constituted "the intentional, systematic omission or undervaluation" of other types of property the court was unable to find.

For purposes of assessment, all types of real property, whether land, residential or commercial, form one class. McKnight Shopping Center, Inc. v. Board of Assessors of Allegheny County, 417 Pa. 234 (1965). Thus, a reassessment of only residential property is ipso facto unlawful since the single class of real estate is thereby improperly and arbitrarily bifurcated. The trial court sought to justify the Assessor's deliberate singling out of residential properties for consideration for revaluation by saying that the action was to correct an inequality because the appellants' properties were underassessed (R71a). This is a curious finding because the trial court also ruled that all of appellants' properties were overassessed (R39a-40a). The trial court took the position that as long as an owner's property is properly assessed, he has no basis for complaint about the assessment of the property of others (R75a); the court misconstrued the extent of relief available to a taxpayer under the equal protection clause of the Constitution:

> "In order to establish an equal protection violation, it is not necessary for a taxpayer to prove that he was overassessed. He may instead show that his property was

assessed at its true value while other property was intentionally undervalued. Sioux City Bridge Company v. Dakota County, 260 U.S. 441, 43 S.Ct. 190, 67 Lawyer's Ed. 340 (1923)." Southland Mall, Inc. v. Garner, 455 F.2d 887, 889 (6th Cir. 1972); Cromwell v. Hillsborough Tp., Somerset County, New Jersey, et al., 149 F.2d 617 (3rd Cir. 1945), aff'd. 326 U.S. 620.

The conscious and deliberate retention of 1965 valuations and assessments for properties other than residential properties, while the latter, at least in Sugarloaf and Conyngham, were assessed at 1972 values, constitutes such an equal protection violation, and the 1972 assessment should therefore be set aside.

C. Application of a 35% assessment ratio to petitioners' properties constituted a denial of equal protection because the Assessor's procedure for determining market values resulted in the systematic undervaluation of other properties and a consequently lower assessment ratio for those properties. Under Cumberland Coal Co. v. Board of Revision, 284 U.S. 23, 52 S.Ct. 48 (1931), application of the same rate to undervalued properties is equivalent to application of a different assessment ratio and constitutes a denial of equal protection.

1. The trial court failed to recognize that application of a flat rate to appraised values does not produce an equal assessment ratio where many appraised values are less than actual value and

others are appraised at actual value.

The court stated in its Finding of Fact No. 19 (R37a) as follows:

> "In determining assessed valuation of real estate, the Luzerne County Board for the Assessment and Revision of Taxes applies a 35% (thirty-five percent) ratio to fair market value as fixed by the Board and this ratio is applied uniformly to such determinations of fair market value throughout Luzerne County." (Emphasis added.)

Again, the court stated (R44a):

> "It is the conclusion of the hearing judge that Mr. Garrity's testimony that his office applies a 35% ratio to fair market value as determined by his office to arrive at assessed value is correct and true and that this ratio is the ratio commonly applied in the County to fair market value as determined by the assessor for that purpose." (Emphasis added.)

From this finding, the trial court concluded (R45a):

> "Thus, what the taxpayer is entitled to is to have this ratio applied to the actual value of his property. Deitch Company v. Board of Property Assessment, supra."

Again, the court stated (R82a):

> "In the instant case, there is credible evidence, as noted above, that the assessor applies the 35% ratio to the assessor's determination of fair market value.
>
> * * *
>
> "As noted herein, above, the court has concluded that the assessor has conducted the assessment for 1972 in accordance with the legal requirements, that the 35% ratio is uniformly and generally applied throughout the county, and that appellants are entitled to the redetermination of market value in accordance with the testimony of the witnesses. In summary, the difficulty with the assessment program is not with the adopted and applied 35% ratio but is with divergent views as to market value which have been resolved as to the three subject properties by this appeal." (Emphasis added.)

Cumberland Coal Co. v. Board of Revision, 284 U.S. 23, 52 S.Ct. 48 (1931) stands for the proposition that application of the same percentage to assigned values where differences between actual values and assigned values are ignored by a deliberate system on the part of the assessor is equivalent to applying a different assessment ratio to actual values which are the same. This court there stated (284 U.S. at 29):

> "Applying the same ratio to the same assigned values, when the actual values differ, creates the same disparity in effect as applying a different ratio to actual values when the latter are the same."

At no point in the case was it disputed that the Assessor applied a percentage rate of 35% to appraised valuations. The error of the court lay in its conclusion that so long as the market value of petitioners' properties was properly calculated, application of the 35% rate to those valuations conformed to constitutional requirements irrespective of the accuracy of the Assessor's determination of market values of other properties in the County. On the contrary, even where the petitioners' properties are accurately valued and assessed at 35%, their right to equal protection is denied where other properties are consistently, intentionally, and deliberately undervalued and the same 35% is applied to arrive at assessed valuations. Sioux City Bridge Co. v. Dakota County, supra.

Petitioners proved numerous procedures deliberately adopted and systematically employed by the Assessor which resulted in arbitrary and discriminatory valuations. The first, discussed above, was the failure of the Assessor to consider for revaluation the great bulk of properties in the County while intensively examining the properties in Sugarloaf and Conyngham for the explicit purpose of "bringing them into line" (raising their valuations). This practice resulted in the continuation of 1965 valuations for

the former, and higher 1972 valuations for the latter. Further was the failure to consider for revaluation any properties other than residential properties, again a practice which resulted in 1972 valuations for the residential properties which were considered and a continuation of 1965 valuations for commercial properties and land.

Apart from limiting reassessment efforts to specific and limited areas within the County and to one type, and thereby undervaluing properties in other areas and of other types, the Assessor consistently and deliberately failed to update information on the interiors of developed properties, but relied instead on the outdated information contained on the master property cards in the Assessor's Office in determining fair market values (R298a). This information was gathered from 1958 through 1965 (R126a-127a). The evidence showed that many of these master property cards contained egregiously outdated information.[2]

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[2] Subassessor Herbert Craze testified as follows (R288a): "Q. Is there any way you can tell from the master property file what the condition of the wiring system is? A. We have a grading system. It was originally graded. Q. Let's take for example. Let's take the Singley property, Respondent's [Exhibit] 3. Can you tell us from that [master property card] what the condition of the wiring system is? A. No. I can tell you what the overall grade of the house at the time it was built. It was good." (Emphasis added.) The Singley property was built "prior to 1900" (R290A).

Thus, no changes to the heating systems, the wiring systems or other substantial improvements of an interior nature were considered by the Assessor's Office in arriving at market value any more than were deteriorations in interior condition. What was on the card with respect to interior condition was what went into the determination of market value in the 1972 Luzerne County assessment. Here again the trial court ignored the necessity for uniformity and equalization and concluded the petitioners' rights had been fully protected by its lowering of the valuations on their properties imposed by the Assessor (R53a).

Similarly, the trial court found no fault with the method employed by the Assessor for all reassessments for the division of acreage during the period in preparation for the 1972 assessment (R2284a -2286a). That method was to change the assessment of the remaining acreage in direct aritmetic proportion to the amount of land left, regardless of the characteristics and actual value of the remainder, and that method was the sole method employed by the Assessor from at least 1968 forward (R2333a). This practice obviously resulted in an undervaluation of the remainder of any tract out of which a less valuable (e.g. hillier, wetter, or more inaccessible) portion was sold off.

Again, overlooking the necessity for equalization, the trial court stated (R74a-75a):

> "...the dispute here basically is not as to the application of the ratio as there is no proof

at all that any ratio other than 35% is applied by the assessors to their office's determination of fair market value, but is to the judgment of the employers of the assessors, and particularly that of Mr. Garrity, as to the determination of fair market value, as to which opinions may well vary to a considerable degree. Here it is urged to be a matter of fundamental legal or constitutional proportions vitiating the entire county assessment that an employer of the assessors follows the aritmetical procedure noted to arrive at the fair market value of the remaining acreage after a portion thereof is sold."

Both by the regular practice of carrying forward 1965 valuations (in the absence of external changes or additions) except in selected areas of the County and for selected types of real estate and by the regular consistent use of obsolete internal data and arithmetic calculations of subdivided land values, the Assessor intentionally and systematically undervalued properties throughout the County. Uniform application of the 35% assessment rate to these undervalued properties produced a true assessment ratio of less than 35%. Application of the 35% rate to the values of petitioners' properties, even as reduced by the court, was therefore not sufficient to satisfy their right to equal protection. In the absence of a finding as to the actual effective ratio applied in the County, the 1972 assessment should be set aside and taxes imposed for 1972 at the 1971 assessment.

2. The trial court erred in holding that inequalities in assessment ratio could be proved only by a showing of the ratios applied to "similar" properties and by refusing to admit evidence that raw acreage values were appreciating more rapidly than residential property values

The petitioners introduced evidence at trial of the actual values of other properties to prove that their value was higher than that assigned to them by the Assessor and that their assessment ratio, calculated by multiplying their assessed value by 35%, was therefore less than 35%. They also sought to introduce evidence that the value of raw acreage had appreciated more rapidly than that of residential property throughout the County. The court ignored the former on the grounds that proof of the true ratio applied generally could be made only by a showing of the ratio applied to "similar" properties (R41a, 44a).

In McKnight Shopping Center, Inc. v. Board of Property Assessment, 417 Pa. 234, 209 A.2d 389 (1965), the Pennsylvania Supreme Court made clear that for purposes of showing a lack of uniformity in the assessment ratio all properties in the taxing district are comparables:

> "Thus, in determining uniformity the ratios of assessed values to market values of all properties are all relevant and, hence, in that sense all properties are 'comparables.'"

Consideration of all kinds of property for purposes of proving unequal assessment ratios is mandated, says McKnight, not only by the Pennsylvania Constitution but by the equal protection clause of the United States Constitution. In holding that petitioners were restricted to showing lower assessment ratios for "similar" (like, residential) properties, the trial court misconstrued the constitutional requirement for uniformity in taxation within the taxable class. By therefore erroneously deeming this proof of lower assessment ratios irrelevant and by consequently holding that a 35% ratio should be applied to petitioners' properties, the court approved assessments which violated petitioners' rights to equal protection.

Further, the trial court refused to admit petitioners' evidence that acreage had appreciated more than had residential property in the County (R617a-618a). The refusal of this evidence was again premised on a misunderstanding of the requirements of the Equal Protection Clause. The evidence was offered in support of petitioners' contention that the Assessor's limitation of consideration for revaluation to residential properties was inherently discriminatory and that unimproved land valued at 1965 levels was necessarily undervalued. Failing to recognize that assessing petitioners' property at 35% of its actual value and assessing other (unimproved) properties at 35% of their unrevised, low, outdated valuations constituted a denial of equal protection, the trial court held that the only point at issue was the value of petitioners' properties (R617a-618a):

"MR. HUDOCK: The relevancy is that the testimony of Mr. Craze is that he and Mr. Walko reassessed the residential property in Sugarloaf and Conyngham. No reference to other property. I am attempting to show that residential property was not the type that was increasing at the fastest rate in the county, and in particular in Sugarloaf and Conyngham. And therefore the representation [sic] of the reassessment to residential property was a denial of due process and equal protection....

"BY THE COURT: Which has how much to do with what the fair market value of what these three properties is? I think I've told you before, Mr. Hudock, and if not I'll tell you again, there are two issues as to each one of three properties. [The fair market value of the property and the assessment ratio to be applied to that.] And I think we understand each other on that; don't we?

"MR. HUDOCK: Yes, we do.

"BY THE COURT: All right. I'll sustain the county's objection.

"MR. HUDOCK: May I make an offer of proof?

"BY THE COURT: Yes, sir.

"MR. HUDOCK: If permitted to testify, Mr. Poggi would testify that in Luzerne County during

> the period 1971 unimproved land was increasing at a faster rate in value than other types of property. On further questioning he would have stated that this was also the situation during 1971 in both Sugarloaf and Conyngham; and that the rate of increase in raw land was more than the rate of increase of residential property...."

As with its limitation of evidence of value to "similar" properties, the trial court's refusal here to entertain evidence of the value of any property other than petitioners' reflected its failure to understand that the proper assessment rate to be applied to petitioners' property depended on the actual assessment ratio applied to other properties, including unimproved land. As a consequence, the court held that the 35% ratio nominally applied to all properties should be applied to the property of petitioners and it thereby approved assessments which were constitutionally void.

D. The 1972 assessment should be set aside, with taxes for 1972 imposed at the 1971 assessment, and petitioners should be awarded attorneys' fees

1. The entire 1972 assessment should be set aside

Because of the numerous systematic irregularities which occurred in the 1972 assessment, petitioners in their prayer for relief asked the court to set aside the entire county assessment and (R10a):

> "Direct...that all properties in Luzerne County be reassessed... in a uniform, equalized and otherwise lawful manner, so as not to discriminate against the assessment of petitioners' property."

The assessment of properties in one area of the taxing jurisdiction and of one type of property at 1972 levels while others remained taxed at 1965 levels, the regular use of obsolete interior data in arriving at assessments, and the arbitrary assessment of subdivided acreage produced a county-wide assessment so fraught with erroneous valuations that the true average assessment ratio applied in the County in 1972 could probably never have been determined without a review of each property. Since petitioners are assessed at a ratio higher than that average, however, they continue to be denied the equal protection of the laws to which they are constitutionally entitled. Sioux City Bridge Co. v. Dakota County, Neb., supra.

The same applies to all other property owners who were overassessed as a result of the unconstitutional procedures employed by the respondent. In Allegheny County, Southern District, Tax Assessment Appeals, 7 Commonwealth Court 291 (1972), the Pennsylvania Commonwealth Court noted that if the assessment statute challenged there were declared unconstitutional, the remaining taxpayers would be relieved of the necessity to relitigate that issue and only the proper amount of their assessments would remain to be determined. So here, if the partial assessment undertaken by the respondent in 1972 is found to have

been unconstitutional, the determination remaining is the proper amount of the assessments of property owners throughout the County.

To accomplish the equalization in assessments required by the Constitution, a new County-wide assessment, pursued through procedures designed to arrive at the true value of all properties, is required. In the interim, a return to 1971 assessments is required to remove the continuing unconstitutional discrimination created by the 1972 assessment.

2. Petitioners should be awarded reasonable attorneys' fees

Included in the relief appellants sought from the trial court was an award of attorneys' fees, expert witness fees and record costs. The court allowed the recovery of record costs (i.e., 2,200 pages of transcript prepared for the trial court briefs); the court denied recovery of attorneys' fees and expert witness fees (R83a-87a).

In Sprague v. Ticonic National Bank, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939) this Court recognized the justice of awarding attorneys' fees to a successful plaintiff out of funds made available to others of his class through his efforts. The trial court's decision rejected the contention that the 1972 assessment should be set aside and the 1971 assessment reinstated. Thus, no "fund" of excess property tax collections resulted. Should this suit finally result in a widespread refund of excess taxes, however, the exception becomes applicable.

The common fund theory has been recognized in Pennsylvania courts for many years. See 3 P.L.E. Attorneys §83 and cases cited therein. Since Pennsylvania cases acknowledge the power of the court to award attorneys' fees on the basis of the equities so far as the common fund doctrine is concerned, such an award here would be both proper and warranted.

Indeed, a new County-wide assessment should result in an increase in tax revenues by raising all assessments in the County to the official ratio of 35% and an award of such fees against the respondent would therefore be appropriate under the "common benefit" rationale. Hall v. Cole, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed. 2d 702 (1973).

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

DAVID FEIST and DOLORES FEIST, his wife, MYRTLE SINGLEY and MARGARETA HAGSTRAND,	:	
Appellants	:	No. 1340
v.	:	C.D. 1974
LUZERNE COUNTY BOARD OF ASSESSMENT APPEALS,	:	
Appellee	:	

BEFORE:
HONORABLE JAMES S. BOWMAN,
President Judge
HONORABLE JAMES C. CRUMLISH, JR.,
Judge
HONORABLE GLENN E. MENCER, Judge
HONORABLE THEODORE O. ROGERS, Judge
HONORABLE GENEVIEVE BLATT, Judge

Argued: October 8, 1975

Entered: December 4, 1975

David Feist and Dolores Feist, his wife, Myrtle Singley and Margareta Hagstrand, Appellants, *v.* Luzerne County Board of Assessment Appeals, Appellee.

Taxation—Assessment of property—Ratio—Fair market value—Act of 1971, June 3, P.L. 133—Uniformity—Common level of assessment—Capriciousness—Errors in computation of market value—The General County Assessment Law, Act 1933, May 22, P.L. 853—Expenses of litigation—Attorney fees—Public benefit—Discretion of court.

The court adopted the opinion of the court below, BIGELOW, J., which was substantially as follows:

1. In appeals from property tax assessments taken pursuant to provisions of the Act of 1971, June 3, P.L. 133, the court must direct the application of the proper ratio of assessment to the actual fair market value of the property subject to assessment. [187-8]

2. Constitutional uniformity requirements dictate that an assessment of a particular taxpayer reflect an assessment at not more than the common level of assessments prevailing in the taxing district as a whole. [188-9-90-1-2]

3. When a county assessor properly applies a specific ratio to the fair market value of property throughout the taxing district, such assessments are not arbitrary, capricious and lacking in constitutional uniformity simply because several fair market value determinations were erroneous and require correction. [192-3-4]

4. The General County Assessment Law, Act 1933, May 22, P.L. 853, gives to the court hearing an appeal thereunder broad discretion in apportioning costs incurred by the parties in the proceedings. [194]

5. The court will award all counsel fees and litigation expenses to a successful litigant only in rare cases where a class is benefited by action of representatives, bad faith of the opposing party has been demonstrated or the litigation effectuated a change in legislative policy, and such costs will not be awarded where only the individual parties have benefited from the suit and the attack made upon an entire county program has not succeeded. [194-5-6-7]

Argued October 8, 1975, before President Judge BOWMAN and Judges CRUMLISH, JR., MENCER, ROGERS and

BLATT. Judges KRAMER and WILKINSON, JR. did not participate.

Appeal, No. 1340 C.D. 1974, from the Order of the Court of Common Pleas of Luzerne County in case of David Feist and Dolores Feist, his wife, Myrtle Singley and Margareta Hagstrand v. Luzerne County Board of Assessment Appeals, No. 1725 March Term, 1972.

Taxpayers appealed from assessment to Luzerne County Board of Assessment Appeals. Appeal denied. Taxpayers appealed to the Court of Common Pleas of Luzerne County. Relief granted in part and denied in part. BIGELOW, J. Taxpayers appealed to the Commonwealth Court of Pennsylvania. Held: Affirmed.

Philip F. Hudock, with him *Robert P. Hudock*, for appellants.

Richard S. Kempes, with him *Joseph A. Quinn, Jr.* and *Hourigan, Kluger & Spohrer Associates*, for appellee.

OPINION BY JUDGE MENCER, December 4, 1975:

This appeal is from an order of the Court of Common Pleas of Luzerne County relative to the 1972 tax assessment of three properties situate in Luzerne County. We have carefully examined the 2,936-page record in this case and conclude that the order of the trial court should be affirmed. Judge BIGELOW has ably presented the essential facts and law in his opinion for the trial court; therefore, we affirm the trial court's order on Judge BIGELOW's opinion, the pertinent portions of which follow:

"FINDINGS OF FACT

"1. The 1971 assessed valuation of the property owned and occupied by David Feist and Dolores Feist, his wife, appellants herein, located in Dipple Manor, Sugarloaf Township, Luzerne County, was fixed at $4,710

by the Luzerne County Board for the Assessment and Revision of Taxes, of which $1,840 was the assessment applied to the land, a parcel averaging 32 feet x 324 feet, and $2,780 was the assessment applied to the residence thereon, a one and one-half story stucco dwelling, 25 feet x 35 feet.

"2. By action of the Board for the Assessment and Revision of Taxes on August 12, 1971, the assessed valuation of this property for 1972 was raised from $4,710 to $10,060, of which the entire increase ($5,350) was applied to the assessment of the residence, the land assessment remaining the same.

"3. The notice advising the owners of this increase stated that the reason for the increase was a change in market value. The Plate Number of the property of David Feist and Dolores Feist is 58-85-1-D15.

"4. The owners appealed this increase to the Board which, after hearing, revised the residence assessment downward by $2,010, left the land assessment unchanged at $1,840, with the result that the revised assessment for the year 1972 was fixed at:

Land:	$1,840
Buildings:	6,210
TOTAL:	$8,050

"5. The revised assessment was appealed to this court, and hearings thereon and the other two (2) appeals herein considered were held May 30, 31, July 24, 25, 26, August 28, 29, September 1, 5, 6, 7, 8, 11, 12, 13, 14, 21, 22, October 2, 11, 31, November 1, 2, 9, 1972.

"6. The 1971 assessed valuation of the property owned and occupied by Myrtle Singley, appellant herein, located at 383 Main Street in the Borough of Conyngham, Luzerne County, was fixed by the Board for the Assessment and Revision of Taxes at $3,770, of which $1,020 was the assessment applied to the land, and $2,750 was the assessment applied to the building thereon.

"7. By action of the Board for the Assessment and Revision of Taxes on August 12, 1971, the assessed valuation of this property for 1972 was raised from $3,770 to $5,050, of which the entire increase ($1,280) was applied to the assessment of the residence, the land assessment remaining the same.

"8. The notice advising the owner of this increase stated that the reason for the increase was a change in market value. The Plate Number of the property of Myrtle Singley is 8-209.

"9. The owner appealed this increase to the Board which, after hearing, denied the appeal.

"10. The assessment for 1972, namely,

Land:	$1,020
Buildings:	4,030
TOTAL:	$5,050

was appealed to this Court and hearings on this appeal and the other two (2) appeals were held on the dates set forth in Finding of Fact No. 5.

"11. The 1971 assessed valuation of the property owned and occupied by Margareta Hagstrand, appellant herein, located in Sugarloaf Township, Luzerne County, was fixed at $3,060 by the Luzerne County Board for the Assessment and Revision of Taxes, of which $330 was the assessment applied to the land, and $2,730 was the assessment applied to the residence thereon.

"12. By action of the Board for the Assessment and Revision of Taxes on August 12, 1971, the assessed valuation of this property for 1972 was raised from $3,060 to $7,850, of which the entire increase ($4,790) was applied to the assessment of the residence, the land assessment remaining the same.

"13. The notice advising the owner of this increase stated that the reason for the increase was a change in market value. The Plate Number of the property of Margareta Hagstrand is 58-365-D15.

"14. The owner appealed this increase to the Board which, after hearing, denied the appeal.

"15. The assessment for 1972, namely,

Land:	$ 330
Building:	7,520
TOTAL:	$7,850

was appealed to this Court and hearings on this appeal and the other two (2) appeals were held on the dates set forth in Finding of Fact No. 5.

"16. The fair market value of the Feist real estate as of August 31, 1971, was $18,600.

"17. The fair market value of the Singley real estate as of August 31, 1971, was $11,600.

"18. The fair market value of the Hagstrand real estate as of August 31, 1971, was $20,000.

"19. In determining assessed valuation of real estate the Luzerne County Board for the Assessment and Revision of Taxes applies a thirty-five percent (35%) ratio to fair market value as fixed by the Board and this ratio is applied uniformly to such determinations of fair market value throughout Luzerne County.

"20. For the year 1972 there were 117,977 parcels of real estate assessed for tax purposes. Of this total, 4,681 parcels were assessed at higher or lower assessments for 1972 than for 1971.

"21. In Conyngham Borough for 1972 there were 583 properties carried on the assessment records; of these, 484, (81.5%) were reassessed for the year 1972. In Sugarloaf Township, of 978 properties on the assessment records, 504 (51.5%) were reassessed, i.e. the 1971 assessment was changed for 1972. Excluding these two municipalities only 3.17% of the properties in the County were reassessed. With the exception of new construction, all assessment changes in these two municipalities were residential properties, mainly single-family dwellings.

"22. The vastly disproportionate number of assessment changes in Sugarloaf Township and Conyngham

Borough, as contrasted with those occurring in other municipalities in Luzerne County for 1972 were the result of direct instructions to Herbert Craze and George Walko, field investigators in the County Assessor's Office by Thomas Garrity, Chief Clerk and Director of the County Assessors' Office, which in turn resulted from Mr. Garrity's conclusions, based upon continuing studies made by him, that in these two municipalities the assessments were 'running behind' fair market value of the properties and exceeded a 14% permissible deviation.

"23. The 'continuing studies' made by Mr. Garrity and his staff, routinely and for all areas of the County, involved comparisons of current assessments of properties with selling prices for said properties set forth in deeds or reflected by revenue stamps when deeds of sales of these properties were recorded and copies received in the Assessor's office.

"24. When these studies indicated a pattern of variation of more than 14% between assessed valuation and what assessed valuation would be if based upon the 35% ratio and sales prices of properties in an area, Mr. Garrity personally would view the properties in the area, and on his instructions members of the assessing staff would make block checks (by exterior views) in the area, check photographs, check for changes in the data appearing on the master file cards and thereafter a consensus of market value would be arrived at by Mr. Garrity and other staff members to which value would be applied the 35% ratio to arrive at the new assessment.

"25. These studies were not used to revalue properties, nor was the information obtained during these studies considered in determining fair market value of the properties in the area involved, in fact these were discarded.

"26. During the 1972 assessment process, in addition to the high number of properties for which changes in 1971 assessments were made in Sugarloaf Township

and Conyngham Borough for 1972, other areas in which intensive assessment activity was carried on for 1972 as the result of the continuing studies included areas of Wilkes-Barre, Plains and Hanover Townships and Laflin Borough.

"27. During the 1972 assessment process each assessed property in Luzerne County was viewed by the sub-assessor assigned, improvements already assessed externally, new additions and construction externally and internally.

"DISCUSSION

"Despite the exceptionally large number of days devoted to hearing testimony in these appeals and the resultant high volume of oral testimony (the hearing judge's handwritten notes total 118 pages) this series of hearings was concerned basically with two (2) issues as to each of the three (3) properties, namely what the proper market valuation and assessed valuation of said properly should be for the year 1972. Rieck Ice Cream Company Appeal, 417 Pa. 249, 254. The resolution of these issues requires two (2) determinations; first, the determination of the correct fair market value of the property; second, if assessed valuation is to be a percentage of market value, the application of a uniform ratio to all properties in the taxing district. Massachusetts Mutual Life Insurance Company Tax Assessment Case, 426 Pa. 566.

"As to the determination of the fair market value of the three (3) subject properties, the hearing judge places greater credence in the testimony of the real estate experts testifying on behalf of the appellants-owners, as it is clear that their inspections of the subject properties were in much greater detail than that of the county assessor's personnel who admittedly had made no interior inspections for a number of years but had relied on unchanged status on a property inventory prepared in 1957,

and determined fair market value without really knowing whether or not any changes had occurred in the interiors. In this connection, it must be noted that the Hagstrand land was bought in 1949 and the house erected thereon was constructed by the Hagstrand family in 1951, that the Feist land was purchased and the home erected by a Mr. Dipple and Mr. Feist during 1951, and that the Singley home is an old home constructed somewhere around 1895, is old-fashioned and obsolete.

"As to the determination and application of the ratio of 35% by the assessor, as noted in Finding of Fact No. 19, this was the essence of the testimony of the witness in charge of this function, Mr. Garrity, the Chief Clerk to and Director of the Board of Assessment Appeals. The point of dispute is appellants' claim that this ratio should not be applied to their properties because, while arithmetically it is applied to a figure called fair market value of each property in the County, in fact the fair market value figure is not and cannot be accurate and therefore ratio or ratios other than 35% of necessity is what is applied to the actual fair market value. In this connection, it must be noted that there are approximately 117,977 pieces of real estate separately assessed for the year 1972, here the year in question.

"By statute, it is directed that:

> 'In the case of real property, the court shall determine, from the evidence submitted at the hearing, what ratio of assessed value to actual value was used generally in the taxing district, and the court shall direct the application of the ratio so found to the value of the property which is the subject matter of the appeal, and such shall be the assessment.' 1971, June 3, P. L. ——, No. 6, §1, 72 P.S. §5350(a).

"If the issue being tried is lack of uniformity, as here, the appealing taxpayer may sustain his burden of proof by a showing that a lower ratio of assessment to actual value has been applied to similar properties: i.e., if the

lack of uniformity in a golf course assessment is the issue, appellant may prove the assessments of other golf courses in the county and may, if relevant, prove that the actual value of other golf courses is different from that determined by the assessors. Valley Forge Golf Club, Inc. Tax Appeal, 3 Pa. Commonwealth Ct. 644, 650. Where, however, the assessors have applied a fixed ratio of assessed to actual value throughout the district, the owner is entitled to have this ratio applied to the actual value of his property. Valley Forge Golf Club, Inc. Tax Appeal, supra, p. 649.

"For the purpose of deciding proper assessments on appeal, the constitutional uniformity requirement mandates that the assessment of a particular appellant shall reflect an assessment at not more than the 'common level' of assessments prevailing in the district as a whole, Rick Appeal, 402 Pa. 209, the appellate court observing that a taxpayer is not entitled to be assessed at the lowest ratio he can point to if in fact that lowest ratio does not reflect the common assessment level in the district. By the term 'common level' is meant the fixed ratio of assessed to market value 'where the evidence shows that the assessors have applied a fixed ratio . . .' and 'where the evidence indicates that no such fixed ratio has been applied, and that ratios vary widely in the district, the average of such ratios may be considered the "common level" '. Deitch Company v. Board of Property Assessment, 417 Pa. 213, 220. In Finding of Fact No. 19, the hearing judge has concluded that the Board applies a 35% ratio to fair market value as determined by the Board to calculate assessed value. This has been the testimony of the witness Garrity, the Director of the Assessors Office, and assessor's records show that this ratio was applied to the fair market values of the three (3) subject properties to arrive at the assessed valuations from which appeals to the Board of Assessment Appeals were taken, i.e.:

	Fair Market Value	Assessed Value	Ratio
Hagstrand:	$22,440	$ 7,850	35%
Singley:	14,412	5,050	35%
Feist:	28,750	10,060	35%

"Much of the testimony offered by appellants' experts, i.e., two (2) real estate brokers (Mr. Poggi and Mr. Bell) and a professor of mathematics at Wilkes College (Dr. John S. Wasileski) is concerned in depth with two (2) propositions: (1) in the case of the two (2) real estate brokers, that in the case of six (6) properties located in the general geopraphic area as the three (3) subject properties, adjusting fair market value as determined by the Assessor's Office to Mr. Bell's and Mr. Poggi's determinations of fair market value for each of these six (6) properties, then applying assessed value to these opinions, the ratios would be as follows:

Name	Land & Buildings	Poggi & Bell Fair Market Value Estimate	Assessment	Ratio
Wyndgate, Inc. Sugarloaf Township	94.8 acres House, Barn	$74,000 (land at $600 per acre) (1969 deed price $60,000)	$5560	7.5%
E. C. Wideman Sugarloaf & Black Creek Townships	388 acres No buildings	$48,500 (at $125 per acre)	$2250 (land only)	4.8%
Harold & Lorraine Benjamin Sugarloaf Township	63.81 acres No buildings	$25,500 (at $400 per acre)	$1100 (land only)	4.0%

Name	Land & Buildings	Poggi & Bell Fair Market Value Estimate	Assessment	Ratio
Warren & Mildred Zehner Black Creek Township	125 acres House, Barn	$31,000 (land only, at $250 per acre)	$1270 (land only)	4.1%
Warren Zehner Black Creek Township	75½ acres No buildings	$9000 (at $125 per acre)	$1021 (land only	11.3%
Frank Walser Sugarloaf Township	61.68 acres House, Stable Garage	$92,500 (at $1500 per acre)	$1650 (land only)	1.8%

"Mr. Poggi further testified that a study conducted by him of ninety-one (91) properties located in twenty (20) municipalities in this County, each of which was sold through his office in 1971, indicated to him that the assessed value of these properties at the time of sale averaged twenty-two percent (22%) of fair market value which in turn was the price recited in the deed where this price and the actual price paid were identical and where they were not identical he selected the actual price paid as shown by his records as the fair market value. Mr. Bell testified that he ran a study of eighty-five (85) real estate sales made through his firm in 1971, and selected forty-two (42) of these, located in eighteen (18) communities, for the purpose of computing the ratio of assessed value to fair market value, and on the basis of his study concluded that the unweighted arithmetic average ratio was twenty percent (20%). He further testified that he used actual sales price as fair market value and did not use the prices recited in the deeds or revenue stamps attached to the deeds as these in many cases are not the actual prices paid. In this connection, the parties involved should consult the provisions of the

Act of 1951, December 27, P. L. 1742, as amended (72 P.S. §3283 et seq.). It is somewhat startling, even in these days of what is called permissiveness, to listen to court proceedings in which the reliance of the assessor's office on real estate prices recited in deeds or on revenue stamps attached to deeds is criticized on the basis that these items required by law to be accurate, do not reflect what the law requires, as evidenced by appellants' witnesses' testimony that the correct information is contained in their files and not in the deeds.

"It is the conclusion of the hearing judge that Mr. Garrity's testimony that his office applies a 35% ratio to fair market value as determined by his office to arrive at assessed value is correct and true and that this ratio is the ratio commonly applied in the county to fair market value as determined by the assessor for that purpose.

. . . .

"The second major thesis of appellants' experts is that the conclusion of Mr. Garrity to examine single family residence assessments in Sugarloaf Township and Conyngham Borough is predicated upon a mathematically invalid procedure and therefore this conclusion and the resulting changes of assessments in this class of property in these municipalities is arbitrary, capricious and unconstitutional.

. . . .

"The pleadings, evidence and argument extend to issues beyond the establishment by the Court of the fair market value of each of these three properties and the application of the 35% generally used ratio to these values resulting in the assessment for each of these properties for the year 1972.

"The point of contact between the divergent positions of the Luzerne County Board of Assessment Appeals on the one hand and the four Petitioners on the other hand is the scope of judicial relief available to Petitioners, the

position of counsel for Petitioners being that it is within the authority of this Court to set aside the entire 1972 County Assessment of Real Property at least as to all affected properties in Sugarloaf Township and Conyngham Borough, by reason of the successful challenge by Petitioners to 'virtually every phase of the procedure followed by the Luzerne County Assessor in assessing properties for the year 1972' (Petitioner's Argument Brief, p. 6) and the position of the Assessor being that the 'limits of judicial action at the Common Pleas level' (Respondent Brief, p. 4) are the determination of fair market value and the application of the generally used taxing ratio to that value.

. . . .

"The Court has examined the specific complaints of appellants and has concluded that the assessor has not failed to comply with the statutory requirements as to the annual assessment or the view of the properties and that a 35% ratio was generally and uniformly applied by the assessors throughout Luzerne County to fair market value estimates as determined by the assessor to calculate assessed value. The Court thus does not agree with appellants' contention that the 1972 assessment involved an illegal partial assessment. To the contrary, this Court has determined in these appeals that the assessor legally conducted the 1972 assessment although in error in varying degree as to the determination of fair market value as to the three subject properties, said errors having been corrected by this Court in determining, on appeal, the 1972 assessments of these three properties.

. . . .

"In summary, the difficulty with the assessment program is not with the adopted and applied 35% ratio but is with divergent views as to market value which have been resolved as to the three subject properties by this appeal.

. . . .

"In his Conclusion to Petitioners' Argument Brief, Petitioners' counsel asks on behalf of the Petitioners herein: that the fair market value of the Feist property for 1972 tax purposes be fixed at $18,600 (the Court has so found, see Finding of Fact No. 16): that the fair market value of the Hagstrand property for 1972 tax purposes be fixed at $20,000 (the Court has so found, see Finding of Fact No. 18: that the fair market value of the Singley property for 1972 tax purposes be fixed at $11,600 (the Court has so found, see Finding of Fact No. 17).

. . . .

"As counsel for Petitioners-Appellants points out in his brief, the statutory provision in the County Assessment Law is rather general with respect to costs and expenses of a hearing. The applicable portion of the statute (72 P.S. §5020-518.1) merely states:

'. . . the costs of the appeal and hearing to be apportioned or paid as the Court may direct: . . .'

"While counsel urges the Court to hold that all fees and costs should be assessed upon the County, there is no clear authority mandating such an award. Essentially the determination is one to be made by the Court in its discretion, and while it is commonplace to impose record costs on the unsuccessful party it is not so as to the other expenses of litigation.

"It is correct that the awarding of costs is a matter which may be considered to be within the equitable powers of the Court. However, the complete imposition of all expenses as requested by Appellant's counsel is only done under the rarest of circumstances.

"Appellant's Counsel cites La Raza Unida v. Volpe, 7 F.R.D. 94 (N.D. Cal. 1972) as authority for the various exceptions under which counsel fees and witness fees may be awarded to a successful appellant or plaintiff. The La Raza Unida case involved a class action brought by residents of a low income housing project to enjoin

the construction of a federally financed highway project which would not only cause the elimination of the residential area, but the destruction of a neighboring park as well. The resident plaintiffs in the case were successful in all respects and the Court awarded expenses of the litigation to them.

"In that decision the Court discussed the three theories upon which awards of this nature have been made. First is the 'common fund' exception, where as a result of the litigation a fund is created to the benefit of the class of plaintiffs involved. In order to mitigate the inequity of many benefiting from the efforts of only a few of their class the Courts have allowed the assessment of attorneys' and witness' fees against the fund, rather than to see the representative parties bear such costs. It does not appear that this exception is applicable here.

"A second theory, an exception, is the 'obdurate behavior' exception. This rule has its application in instances where the defendants have acted in bad faith. It can be seen to apply in instances where a party defendant with great resources, but not much law, on his side determines to protract ligitation merely on the theory that he can wear his opponent to complete financial exhaustion. The key factor, of course, must be the proven bad faith of the offending party. Once again, however, this exception does not appear to have application in this case. There is no indication that the County Assessment Board acted in bad faith, although the Court has concluded that some of its determinations were in error but not obdurate and of calculated design.

"The third theory under which such fees have been awarded is the 'private attorney general exception'. Petitioners' counsel submits that this Court may properly award counsel fees in this case under this doctrine by virtue of which Courts, as in the La Raza Unida case, have allowed such fees on the rationale that the end result of the litigation effectuated Congressional or legislative policy.

"In La Raza Unida the policy effectuated was the Congress' expressed intent as stated in housing legislation. The Court there also considered as elements the fact that the litigation benefited a great number of people and the consideration that private enforcement had been required to effectuate this policy at a great cost to the plaintiff litigants.

'The application of this doctrine in the present case might possibly be more feasible if the Court were to grant all of the relief requested by Appellants. However, as noted earlier, the Court has not sustained the broad attack on the entire County assessment program which appellants have urged.

"Absent an end result which might be argued in essence to effectuate the intention of the State legislature in the promulgation of the County Assessment Law, it is impossible to apply the exception here. Moreover, as only the individual appellants have been successful in this proceeding, it cannot be said that a large number of people have benefited from the litigation.

"Aside from all these considerations, this Court also must take note that in most cases where awards of this nature have been allowed, the class of litigants involved have been relatively indigent groups such as low-rent housing residents, La Raza Unida v. Volpe (supra) or an Indian tribe, Pyramid Lake Paiute Tribe of Indians v. Morton, 360 F. Supp. 669 (1973). This is not the case in the present situation.

"Nonetheless, the individual appellants, with respect to their own individual properties, have been successful in their appeals. There is authority in such situations to assess the record costs upon the defendant municipal agency or body. See Weitzenkorn & Sons v. Commissioners of County of Luzerne, 8 Kulp (Luzerne Leg. R. 165) (1895). And when it appears that the assessors or county commissioners acted in good faith, but that the assessment is too high, the county should be ordered to

pay the record costs of the appeal, but the appellant should not be allowed costs for the subpoenaing and attendance of his witnesses; each party should pay his own witnesses. Cambridge Spring Company's Appeal, 21 C.C. 669, 8 Dist. 55 (1889). See also Pringle's Appeal, 6 Kulp (Luzerne Leg. R. 525) (1892).

"This seems to be the fairest and most equitable thing to do in the present case. Inasmuch as the individual appellants are to be successful in their Appeals, the record costs should be placed upon the County. Since the record in this matter consists of four large volumes this is no small cost. However, the respective parties will be required to pay their own counsel and witness fees.

. . . .

"ORDER

"Now, this 9th day of September, 1974, at 12:05 P.M., the assessed valuation for the property owned by David Feist and Dolores Feist (see Finding of Fact No. 1) for the year 1972 hereby is fixed at: $6,510.00 (18,600 x .35); the assessed valuation for the property owned by Myrtle Singley (see Finding of Fact No. 6) for the year 1972 is hereby fixed at $4,060.00 ($11,600 x .35); the assessed value for the property owned by Margareta Hagstrand (see Finding of Fact No. 11) is hereby fixed at $7,000.00 ($20,000 x .35). All other items of relief requested by petitioners hereby are denied. Each party is to pay his, her or its own costs including attorneys' fees and witness fees, but Luzerne County, appellee-respondent is to pay all record costs i.e., court stenographer's charges for transcripts.

"By the Court
RICHARD L. BIGELOW, J."

Order affirmed.

APPENDIX B

Supreme Court of Pennsylvania
Eastern District

Sally Mrvos
Prothonotary
Laura E. Litchard
Deputy Prothonotary

Philadelphia 19107

October 7, 1976

Philip F. Hudock, Esquire
Suite 408 First Valley Bank Bldg.
Broad and Wyoming Streets
Hazleton, Pa. 18201

Re: David Feist and Dolores Feist, his wife, et al. v. Luzerne County Board of Assessment Appeals
No. 2278 Allocatur Docket

Dear Mr. Hudock:

This is to advise you that the Supreme Court has entered the following Order on the Petition for Allowance of Appeal in the above-captioned matter:

"September 30, 1976
Denied
Per Curiam"

An application for Reconsideration of Denial of Allowance of Appeal must be prepared in the same manner as the original petition (see Pa. R.A.P. 1111), must be confined to the grounds and must contain the certification set forth in Pa. R.A.P. 1123(b)(1) and (2), and, in order to be

timely, must be received within seven days after the date of mailing of this notice.

No answer to an Application for Reconsideration of Denial of Petition for Allowance of Appeal will be received unless requested by the Supreme Court on its own motion.

Very truly yours,

Sally Mrvos
Prothonotary

By /s/
Deputy Prothonotary

LEL:ejh
cc: Joseph A. Quinn, Jr., Esquire
Richard S. Kempes, Esquire